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No. 03-339

In the
Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND RELIGIOUS ORGANIZATIONS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....ii

INTEREST OF AMICI CURIAE....1

SUMMARY OF ARGUMENT....1

ARGUMENT....2

I. CASES DECIDED PURSUANT TO THE ALIEN TORT CLAIMS ACT ADDRESS CORE HUMAN RIGHTS NORMS OF CENTRAL CONCERN TO THE INTERNATIONAL COMMUNITY AND ACCEPTED AS BINDING BY THE UNITED STATES....3

II. CIVIL LAWSUITS UNDER THE ALIEN TORT CLAIMS ACT ARE PART OF A COMMON INTERNATIONAL EFFORT TO ADDRESS THE PROBLEM OF IMPUNITY BY HOLDING ACCOUNTABLE PERPETRATORS OF EGREGIOUS ABUSES....15

A. Holding perpetrators accountable and providing redress for victims of abuse are key priorities for governments, including the U.S. government, as well as for international associations and nongovernmental organizations around the world....16

B. States adopt varied mechanisms to enforce international law that are appropriate to their national legal systems, including civil, criminal and administrative proceedings and public and private endeavors....19

III. THE ARBITRARY ARREST AND DETENTION OF RESPONDENT VIOLATED A CORE PRINCIPLE OF INTERNATIONAL HUMAN RIGHTS LAW....27

CONCLUSION....29

TABLE OF AUTHORITIES

FEDERAL CASES

Abebe-Jira v. Negewo,
72 F.3d 844 (11th Cir. 1996).....5, 10, 11

Beanal v. Freeport-McMoran, Inc.,
197 F.3d 161 (5th Cir. 1999).....5, 14

Estate of Cabello v. Fernandez-Larios,
157 F. Supp. 2d 1345 (S.D. Fla. 2001).....8,11, 13

Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.,
528 F. Supp. 1337 (S.D.N.Y. 1982).....14

Cohen v. Hartman,
634 F.2d 318 (5th Cir. 1981).....14

De Wit v. KLM Royal Dutch Airlines,
570 F. Supp. 613 (S.D.N.Y. 1983).....14

Estate of Rodriguez v. Drummond Co.,
256 F. Supp. 2d 1250 (N.D. Ala. 2003).....15

Eastman Kodak v. Kavlin,
978 F. Supp. 1078 (S.D. Fla. 1997).....11

Filártiga v. Peña-Irala,
630 F.2d 876 (2d Cir. 1980).....4, 9

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343 F.3d 140 (2d Cir. 2003).....5, 14

Forti v. Suarez Mason,
672 F. Supp. 1531 (N.D. Cal. 1987).....11

Forti v. Suarez-Mason,
694 F. Supp. 707 (N.D. Cal. 1988).....9, 11

Guinto v. Marcos,
654 F. Supp. 276 (S.D. Cal. 1986).....14

Hamid v. Price Waterhouse,
51 F.3d 1411 (9th Cir. 1995).....14

Hilao v. Estate of Marcos,
25 F.3d 1467 (9th Cir. 1994),
cert. denied, 513 U.S. 1126 (1995).....5, 8, 9, 10, 25

IIT v. Vencap, Ltd.,
519 F. 2d 1001 (2d Cir. 1975).....14

Jones v. Petty Ray Geophysical Geosource, Inc.,
722 F. Supp. 343 (S.D. Tex. 1989).....14

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995).....6, 8, 12, 13

Maugein v. Newmont Mining Corp.,
No. CIV.A. 02-M-204, 2004 WL 73279
(D. Colo. Jan. 15, 2004).....14

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002).....6, 11, 13

Mushikiwabo v. Barayagwiza,
No. 94 CIV. 3267 (JSM), 1996
WL 164496 (S.D.N.Y. Apr. 9, 1996).....6

Paul v. Avril,
901 F. Supp. 330 (S.D. Fla. 1994).....11, 29

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
244 F. Supp. 2d 289 (S.D.N.Y. 2003).....6, 7, 13

Rodriguez-Fernandez v. Wilkinson,
654 F.2d 1382 (10th Cir. 1981).....11

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331 F.3d 604 (9th Cir. 2004).....25, 28

Tamari v. Bache & Co. S.A.L.,
730 F.2d 1103 (7th Cir. 1984).....14

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995).....8, 9, 11

In re Yamashita,
327 U.S. 1 (1946).....13

INTERNATIONAL CASES

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.),
1996 I.C.J. 595, 616 (July 11).....6

Barcelona Traction, Light and Power Co. Ltd (Belg. v. Spain)
1970 I.C.J. 3 (Feb. 5).....7

Prosecution of Bouterse,
HR Sept. 18, 2001.....22

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HR Nov. 11, 1997,
1998 Dutch Law Reports 463.....22

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140/2002 (June 12, 2003)
(Ricardo Miguel Cavallo)
(Mexico Supreme Court decision).....24

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Oct. 1, 1946, 41 AM. J. INT'L L. 172, 221 (1947).....16

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1980 I.C.J. 3 (May 24).....10

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Brussels Court of Assizes, June 8, 2001.....23

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8 U.S.C. § 1182(a)(3)(E).....25

18 U.S.C. §1091.....21

18 U.S.C. §2333.....21

18 U.S.C. §2340.....21

18 U.S.C. §2340A.....9, 21

18 U.S.C. §2340B.....21

18 U.S.C. §2441.....13, 21

22 U.S.C. §262(d).....8

22 U.S.C. §2304(d)(1).....10

22 U.S.C. §2151(n).....8

22 U.S.C. §2304 (§502B of the Foreign Assistance Act).....8, 9

28 U.S.C. §1350.....*passim*

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AP, Sept. 30, 2003.....23

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AFP, Jan. 7, 2004.....23

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INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of Respondent Humberto Alvarez-Machain, with the written consent of the parties.[1] As listed in Appendix A, *Amici* include dozens of international human rights organizations and religious organizations working to protect basic human rights in this country and around the world. Although each organization has its own particular focus and mandate, *amici* share a commitment to three issues at the heart of this case. First, all human beings have a fundamental right to be free from egregious human rights abuses, including genocide; slavery; summary execution; disappearance; torture; cruel, inhuman or degrading treatment or punishment; arbitrary detention; crimes against humanity; and war crimes. Second, those responsible for such violations must be held accountable, as a matter of simple justice, to deter future abuses and to offer redress to the survivors of abuse. Finally, the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA), is fully consistent with basic principles of international human rights law and contributes significantly to the worldwide movement to end impunity and hold human rights abusers accountable.

SUMMARY OF ARGUMENT

The nations of the world have reached a consensus that international law prohibits a set of core human rights abuses. These prohibitions are universally considered to be binding; no nation claims the right to violate them. Although litigants have attempted to assert claims over a wide range of additional abuses, the courts have consistently applied the Alien Tort Claims Act to a short list of egregious human rights abuses.

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[1]Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Despite the universal condemnation of these human rights violations, perpetrators all too often escape punishment. Finding means to hold perpetrators accountable is a key priority for governments, including the U.S. government, as well as for international and nongovernmental organizations around the world. Domestic and international actors have undertaken varied initiatives, including criminal prosecutions initiated both by public prosecutors and by private individuals, civil litigation, and assorted administrative proceedings. Each state chooses mechanisms appropriate to its local legal system. Civil litigation under the ATCA is part of a global effort to address impunity and to hold perpetrators of egregious abuses accountable for their actions.

The facts presented below support the finding that Respondent suffered arbitrary arrest and detention in violation of a core principle of international human rights law. The judgment holding Petitioner responsible for his violation of the rights of Respondent is an important contribution to the worldwide battle against impunity. Petitioner improperly attempts to paint this case as hindering efforts to combat terrorism. If there is any connection, it is exactly the opposite: using judicial means to redress egregious abuses furthers the struggle against terrorism, rather than undermining it.

ARGUMENT

Every court to have reached a decision on the issue has held that the Alien Tort Claims Act creates a cause of action authorizing individuals to seek damages for injuries inflicted by violations of international law. The organizations joining this brief support both the historical conclusion that the first Congress intended this result and the modern analysis that judicial consideration of such lawsuits complies with the U.S. Constitution. These points have been fully briefed by Respondent and other *amici curiae* and will not be repeated

here. Instead, *amici* submit this brief to demonstrate that the modern application of the ATCA, which permits victims of core human rights abuses to seek civil redress in U.S. courts, is fully consistent with international law and with the practice of domestic legal systems around the world. International norms increasingly permit -- or even require -- states to hold perpetrators of human rights abuses accountable for their actions. Civil lawsuits are one manner in which the United States contributes to the international movement to fight impunity and provide redress to survivors of abuse.

I. CASES DECIDED PURSUANT TO THE ALIEN TORT CLAIMS ACT ADDRESS CORE HUMAN RIGHTS NORMS OF CENTRAL CONCERN TO THE INTERNATIONAL COMMUNITY AND ACCEPTED AS BINDING BY THE UNITED STATES.

The Alien Tort Claims Act permits claims for violations of internationally protected human rights, those that fall within the definition of a "tort . . . in violation of the law of nations." As properly applied by the courts, these violations include a short list of the most egregious human rights abuses, all universally condemned by binding norms that are of central concern to the international community and are recognized as obligatory by the U.S. government.

The protection of individual human rights has been recognized at least since World War II as one of the central goals of the international legal system. The Charter of the United Nations, a treaty ratified by virtually every nation in the world, proclaimed the promotion of human rights and fundamental freedoms as one of the primary purposes of the organization. Art. 1(3). The United States has repeatedly declared itself one of the leading advocates for the promotion of human rights. In 2003, the U.S. Department of State reaffirmed this longstanding commitment:

> In a world marching toward democracy and respect for human rights, the United States is a leader, a partner and a contributor. We have taken this responsibility with a deep and abiding belief that human rights are universal.... [T]heir protection worldwide serves a core U.S. national interest.

U.S. Dep't of State, 2002 Country Reports on Human Rights Practices, Preface (Mar. 2003) [hereinafter Dep't of State, 2002 Human Rights Report].[2] Over the past few decades, widely ratified human rights treaties have linked almost every state in a common commitment to protect the most basic human rights.[3]

The ATCA properly addresses those abuses on which the international community has reached a consensus. The requirement that a plaintiff allege a tort "in violation of the law of nations" narrows the reach of the statute to a short list of universally recognized, clearly defined international law abuses. As the Second Circuit recognized in *Filártiga v. Peña-Irala,* this standard "is a stringent one," applying to "well-established, universally recognized norms of international law." 630 F.2d

[2]*Available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18132pf.htm.

[3]*See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by 151 states, including the United States); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (ratified by 133 states, including the United States); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Treaty Doc. No. 80-1, 78 U.N.T.S. 277 [hereinafter Convention Against Genocide] (ratified by 135 states, including the United States). For ratification information, see Status of Ratifications of the Principal International Human Rights Treaties (Nov. 2, 2003), *available at* http://www.unhchr.ch/pdf/report.pdf. *See also* Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

876, 881, 888 (2d Cir. 1980).[4] Other Circuits have consistently followed this approach.[5] As a result, the courts have upheld ATCA claims only when based upon core abuses that are readily definable and universally condemned by the international community. Indeed, the history of ATCA litigation demonstrates that the statute has been carefully applied to reach the core international law violations that fall within the scope of the law of nations, including genocide; slavery; summary execution; disappearance; torture; cruel, inhuman or degrading treatment or punishment; arbitrary detention; crimes against humanity; and war crimes.

Genocide, long recognized as among the most egregious violations of human rights, is clearly defined under both international and U.S. law as the attempt "to destroy in whole or in part, a national ethnic, racial or religious group as such." Convention Against Genocide, art. II. As stated in the Senate Report accompanying the Genocide Convention Implementation Act, "[t]he crime of genocide is among the most depraved acts that can be committed." S. Rep. No. 100-333, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4158. The Convention Against Genocide reflects this universal prohibition, which is now recognized as binding on all nations, regardless of whether they

[4]*Accord Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003).

[5]The Ninth Circuit has recognized that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Hilao v. Estate of Marcos,* 25 F.3d 1467, 1475 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995). The Eleventh and Fifth Circuits have also applied this strict standard to define the limited set of torts "in violation of the law of nations." *See, e.g., Abebe-Jira v. Negewo,* 72 F.3d 844 (11th Cir. 1996) (finding torture actionable under the ATCA, citing case law from both the Second and Ninth Circuits); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (rejecting claims based on environmental damage because they did not meet the standard articulated by the Second Circuit).

have ratified the Convention.[6] Given the universal recognition of genocide as a violation of international law, the courts have uniformly upheld application of the ATCA to claims of genocide. *See, e.g., Kadic v. Karadzic,* 70 F.3d 232, 242 (2d Cir. 1995) (violent acts with the intent to destroy religious and ethnic groups would constitute genocide); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (campaign of violence directed against non-Muslim population of southern Sudan constituted genocide within the reach of the ATCA).[7] As summarized by the court in *Presbyterian Church of Sudan,* the "genocidaire" has "come to be considered *hostis humani generis,*" an enemy of all mankind. 244 F. Supp. 2d at 309.

Widely ratified treaties dating back to the nineteenth century prohibit *slavery,* the first violation of human rights to be banned by international law.

> It is well-established that prohibitions against slavery and slave-related practices have achieved the level of customary international law and have attained *jus cogens* status. An array of conventions and treaties, both multilateral and bilateral in nature, contain these prohibitions and proscribe such practices in times of war and during peace.

M. Cherif Bassiouni, *Enslavement as an International Crime,* 23 N.Y.U. J. INT'L L. & POL. 445, 445 (1991).[8] In condemning trafficking in persons, Congress emphasized that "the right to be free from slavery and involuntary servitude is among [the] inalienable rights" of all human beings. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (2000), § 102 ("The international community has repeatedly condemned slavery and involuntary servitude."). Claims of slavery or the slave trade constitute actionable causes of action under the ATCA. *Presbyterian Church of Sudan,* 244 F. Supp. 2d at 326.

Virtually every major human rights agreement protects against *summary execution*, or the arbitrary deprivation of life. An execution is considered arbitrary if it is neither "lawful punishment pursuant to conviction in accordance with due process of law" nor "necessary under exigent circumstances." Restatement (Third) of Foreign Relations Law of the U.S. § 702 cmt. f (1987) [hereinafter Restatement]. The prohibition against summary execution is non-derogable.[9] Congress has recognized summary execution as a human rights violation by enacting the Torture Victim Protection Act, 28 U.S.C. § 1350 (recognizing a cause of action for summary execution). Congress has also denied U.S. funding to countries that practice "gross violations of internationally recognized human rights," and has defined

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[6] *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* 1951 I.C.J. 15, 23 (May 28) (confirming that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.),* 1996 I.C.J. 595, 616 (July 11) (affirming that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*."

[7] *See also Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (claims based on genocide in Bosnia-Herzegovina); *Mushikiwabo v. Barayagwiza,* No. 94 CIV. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (claims based on genocide in Rwanda).

[8] *See also Barcelona Traction, Light and Power Co. Ltd (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5) (holding that protecting people from slavery is an obligation *erga omnes*).

[9] *See, e.g.,* ICCPR, arts. 4, 6 (the right not to be arbitrarily deprived of life is never derogable, not even in times of public emergency); European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 2, 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (neither war nor any other public emergency is a justification for summary execution).

these violations to include a "flagrant denial of the right to life, liberty or the security of person," a concept that encompasses summary execution. *See* 22 U.S.C. § 262(d) (aid to international financial institutions), § 2151(n) (development aid), and § 2304 (security assistance). Claims of summary execution clearly satisfy the requirements of the ATCA. *See Kadic,* 70 F.3d at 243-44 (summary executions committed in the former Yugoslavia); *Hilao,* 25 F.3d at 1475 (summary executions in the Philippines).[10]

International law condemns *enforced disappearance* as a violation of several interrelated fundamental human rights. As such, numerous international agreements and decisions condemn "disappearance," including the ICCPR, arts. 6, 7, 9, 10, 14, 15, 17, and the UDHR, arts. 3, 5, 9, 10, 11 (as interpreted by G.A. Res. 173, U.N. GAOR, 33d Sess., Supp. No. 45, at 158, U.N. Doc. A/33/173 (1978)).[11] The Restatement § 702(c) includes disappearance as a violation of the international law of human rights. Disappearance has been defined as a detention or abduction by state officials or their agents, followed by official refusal to acknowledge the abduction or to disclose the detainee's fate. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 133, U.N. GAOR, 47th

[10]*See also Estate of Cabello v. Fernandez-Larios,* 157 F. Supp. 2d 1345, 1358-60 (S.D. Fla. 2001) (summary execution of civilian arrested after military coup in Chile); *Xuncax v. Gramajo,* 886 F. Supp. 162, 184-85 (D. Mass. 1995) (summary executions committed by Guatemalan military).

[11]*See also* Annual Report of the Inter-American Commission on Human Rights, Organization of American States, AG/Res. 666 (XIII-0/83) (1983) (denouncing disappearance as "an affront to the conscience of the hemisphere and . . . a crime against humanity."); *Velasquez-Rodriguez,* Inter-Am. C.H.R. (ser. C), No. 4, ¶¶ 155-58, *reprinted in* 28 I.L.M. 291, 322-324 (1989) (finding that in "disappearing" Velasquez-Rodriguez, Honduras violated his rights to life, humane treatment, and personal liberty as defined by articles 4, 5, and 7 of the American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (*entered into force* July 18, 1978)).

Sess., Preamble, U.N. Doc. A/Res/47/133 (1992). Claims of disappearance trigger ATCA jurisdiction. *Forti v. Suarez-Mason,* 694 F. Supp. 707, 711 (N.D. Cal. 1988) (finding the "existence of a universal and obligatory international proscription of the tort of 'causing disappearance.'"); *Hilao,* 25 F.3d at 1475 (same).[12]

Every major human rights instrument prohibits *torture,* including the Convention Against Torture. The prohibition against torture is also a binding norm of customary international law. As the U.S. executive branch has stated:

> This uniform treaty condemnation of torture provides a strong indication that the proscription of torture has entered into customary international law. . . . While some nations still practice torture, it appears that no state asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use. That conduct evidences an awareness that torture is universally condemned.[13]

This prohibition is well-ingrained in U.S. domestic law, which makes torture committed anywhere in the world a federal crime if the perpetrator is found within the United States, 18 U.S.C. § 2340A; prohibits the extradition of individuals illegally in the United States to a place where they may be tortured, 22 C.F.R. § 95.2 (2004); and denies federal foreign aid to countries where torture takes place, 22 U.S.C. § 2304 (§502B of the Foreign Assistance Act). The courts have uniformly recognized that the ATCA encompasses claims of torture. As stated in *Filártiga,* 630 F.2d at 890, "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani*

[12]*See also Xuncax*, 886 F. Supp. at 184-85.

[13]Memorandum for the United States as Amicus Curiae at 12-13, 16, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

generis, an enemy of all mankind." *See also Hilao,* 25 F.3d at 1475; *Abebe-Jira,* 72 F.3d at 846-48.

All of the major international human rights instruments prohibit *cruel, inhuman, or degrading treatment or punishment* as a norm distinct from torture, including the Convention Against Torture, the ICCPR, arts. 4, 7 (derogation from right to be free of cruel, inhuman, or degrading treatment not permitted even in time of public emergency), and the UDHR, art. 5 ("No one shall be subjected to... cruel, inhuman or degrading treatment or punishment.").[14] Both the legislative and executive branches of the U.S government have determined that cruel, inhuman, or degrading treatment or punishment violates international law. *See* 22 U.S.C. § 2304(d)(1) (listing cruel, inhuman or degrading treatment or punishment among "gross violations of internationally recognized human rights"); Dep't of State, 2002 Human Rights Report, Overview (stating that the right to be free from cruel, inhuman, or degrading treatment or punishment is an "internationally recognized individual" right).[15] As interpreted by the U.S. government, cruel, inhuman or degrading treatment "means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." U.S. Reservation to Art. 16 of the Convention Against Torture, 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990). Claims of cruel, inhuman and degrading treatment fall within the

[14]*See also* European Convention, art. 3.

[15]*See also United States Consular and Diplomatic Staff in Tehran (U.S. v. Iran),* 1980 I.C.J. 3 (May 24) (the executive branch successfully invoked provisions of international human rights instruments proscribing cruel, inhuman, or degrading treatment); Restatement § 702(d) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment.").

reach of the ATCA. *Abebe-Jira,* 72 F.3d 844.[16]

Numerous international instruments prohibit *arbitrary arrest or detention,* including the ICCPR, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."), and the UDHR, art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile.").[17] This prohibition has been recognized as a binding norm of customary international law, derogable only "in time of public emergency which threatens the life of the nation." ICCPR, art. 4. "No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." *Rodriguez-Fernandez v. Wilkinson,* 654 F.2d 1382, 1388 (10th Cir. 1981). A detention is arbitrary when not pursuant to lawful authority. Restatement § 702 cmt. h.[18] The ATCA properly applies to allegations of arbitrary detention. *Mehinovic,* 198 F. Supp. 2d at 1349.[19]

Crimes against humanity were first codified as a violation of

[16]*See also Mehinovic,* 198 F. Supp. 2d at 1347-49; *Estate of Cabello,* 157 F. Supp. 2d at 1361; *Xuncax,* 886 F. Supp. at 186-87; *Paul v. Avril,* 901 F. Supp. 330 (S.D. Fla. 1994). *But see Forti v. Suarez Mason,* 672 F. Supp. 1531, 1543 (N.D. Cal. 1987), on reconsideration 694 F. Supp. at 711-12 (early case rejecting cruel, inhuman or degrading treatment; holding has not been followed by subsequent cases).

[17]The prohibition against arbitrary arrest and detention was included in the Magna Carta, art. 39: "No freeman shall be taken, or imprisoned . . . except by the lawful judgment of his peers or by the law of the land."

[18]*See also* United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* at 7, U.N. Doc E/CN.4/826/Rev.1 (1964) (an arbitrary arrest or detention is one not in accordance with procedures established by law). See full discussion *infra* Point III.

[19]*See also Eastman Kodak v. Kavlin,* 978 F. Supp. 1078, 1092-95 (S.D. Fla. 1997); *Xuncax,* 886 F. Supp. at 184-85; *Paul,* 901 F. Supp. 330; *Forti,* 672 F. Supp. at 1541-42.

international law in the Nuremberg Charter following World War II. Nuremberg Charter, art. 6(c). Although the concept dates back to the early part of the twentieth century, the Nuremberg codification for the first time established international criminal responsibility for perpetrators who were the same nationality as their victims. Theodor Meron, *Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 263 (2000). A 1947 resolution of the U.N. General Assembly affirmed the prohibition of crimes against humanity. G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1947). The prohibition has since been included in the statutes creating the International Criminal Tribunal for the Former Yugoslavia, art. 5; the International Criminal Tribunal for Rwanda, art. 3; the Special Court for Sierra Leone, art. 2; and the Rome Statute establishing the International Criminal Court, art. 7.[20] The prohibition of crimes against humanity is now a binding rule of customary international law.[21] Congress has repeatedly recognized the status of crimes against humanity as a violation of international law. In 1998, for example, Congress passed legislation "urg[ing] the President to call upon the United Nations to establish an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and other Iraqi officials who are responsible for crimes against humanity, genocide, and other criminal violations of international law." Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (1998). Cases alleging crimes against humanity properly fall within the ATCA. *Kadic*, 70 F.3d at 242-

[20]The widely ratified statute of the International Criminal Court, art. 7(1), defines a crime against humanity as one of a series of acts of violence "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The statute had been ratified by 92 nations as of February 2004.

[21]Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 557 (1995) ("Crimes against humanity are crimes under customary law.").

43.[22]

War crimes such as murder, torture, and arbitrary detention of civilians, committed in the course of armed conflict, have long been recognized as heinous violations of international law. See, e.g., Common Article 3 of the four Geneva Conventions, which have been ratified by the United States and over 190 countries, as well as the provisions defining "grave breaches" of the Conventions.[23] The United States explicitly refers to grave breaches of the Geneva Conventions and Common Article 3 in defining "war crimes" that are to be prosecuted under the War Crimes Act, 18 U.S.C. § 2441. Moreover, U.S. courts have held repeatedly that war crimes violate international law. *See In re Yamashita*, 327 U.S. 1, 14-16 (1946); *Kadic*, 70 F.3d at 242-43; Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 INT'L CONCILIATION 304 (April 1949) (collecting cases confirming the liability of private individuals for committing war crimes).

As this overview confirms, these basic prohibitions are universally recognized as binding rules of international law, applicable to all nations of the world. The United States shares this general consensus, recognizing each of these norms as binding international obligations. There is also a clear consensus as to the definition of each, and U.S. courts have had no

[22]*See also Presbyterian Church of Sudan*, 244 F. Supp. 2d at 324-27; *Mehinovic*, 198 F. Supp. 2d at 1352-54; *Estate of Cabello*, 157 F. Supp. 2d at 1360-61.

[23]Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 321, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

difficulty identifying and applying these definitions.

The enforcement of these norms is of central concern to the international human rights community represented by *amici,* as well as to governments and national and international organizations around the world. The application of the ATCA to claims alleging violations of these core international norms is fully consistent with the mandate of the statute to provide redress to individual victims of tortious abuses of the "law of nations."

Equally important, the courts have firmly rejected claims of violations of the law of nations when they find that they do not meet the stringent standard required by the statute: that is, claims that do not allege violations of well-established, universally recognized norms of international law. For example, federal courts have repeatedly dismissed ATCA cases based on environmental harms. *See, e.g., Flores,* 343 F.3d at 160-61; *Beanal,* 197 F.3d at 167. Courts have also dismissed a panoply of other ATCA actions that failed to raise recognized claims under international law such as fraud, negligence, censorship, commercial torts, conversion, or defamation.[24]

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[24]*Hamid v. Price Waterhouse,* 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud); *Tamari v. Bache & Co. S.A.L.,* 730 F.2d 1103, 1104 (7th Cir. 1984) (fraud); *Jones v. Petty Ray Geophysical Geosource, Inc.,* 722 F. Supp. 343, 348 (S.D. Tex. 1989) (negligence); *Guinto v. Marcos,* 654 F. Supp. 276, 280 (S.D. Cal. 1986) (censorship); *De Wit v. KLM Royal Dutch Airlines,* 570 F. Supp. 613, 618 (S.D.N.Y. 1983) (commercial torts); *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.,* 528 F. Supp. 1337, 1347 (S.D.N.Y. 1982) (commercial torts); *Cohen v. Hartman,* 634 F.2d 318, 320 (5th Cir. 1981) (conversion); *IIT v. Vencap, Ltd.,* 519 F.2d 1001, 1020 (2d Cir. 1975) (conversion); *Maugein v. Newmont Mining Corp.,* No. CIV.A. 02-M-204, 2004 WL 73279, at *5 (D. Colo. Jan. 15, 2004) (defamation).

The federal courts have also dismissed claims involving well-established, universally recognized norms of international law when the pleadings fail to support the essential elements of the claim. *See, e.g., Beanal,* 197 F.3d at 168 (genocide claim unavailable when pleadings "are devoid of discernable means to define or identify conduct that constitutes a violation of international law"); *Estate of Rodriguez v. Drummond Co.,* 256 F. Supp 2d 1250, 1261 (N.D. Ala. 2003) (genocide claim unavailable where plaintiffs fail to allege that persecution was due to national, ethnic, racial, or religious reasons).

By authorizing civil litigation for violations of universally recognized international human rights norms, the ATCA, as carefully applied by the courts, serves the important goal of human rights accountability. ATCA litigation represents an important contribution to the international struggle against impunity and in favor of the rule of law.

II. CIVIL LAWSUITS UNDER THE ALIEN TORT CLAIMS ACT ARE PART OF A COMMON INTERNATIONAL EFFORT TO ADDRESS THE PROBLEM OF IMPUNITY BY HOLDING PERPETRATORS OF EGREGIOUS ABUSES ACCOUNTABLE.

The need to hold accountable those who commit egregious human rights abuses is among the most pressing issues facing the world community today. International associations, governments, including the U.S. government, and nongovernmental organizations share this assessment. The responsibility for enforcing international law norms rests primarily on domestic legal systems, which have adopted varied mechanisms to address the problem of impunity. Civil litigation in U.S. courts under the Alien Tort Claims Act represents one such mechanism. This approach is fully consistent with international law, and contributes significantly to the worldwide effort to hold perpetrators of human rights violations accountable for their actions.

A. Holding perpetrators accountable and providing redress for victims of abuse are key priorities for governments, including the U.S. government, as well as for international associations and nongovernmental organizations around the world.

The commitment to accountability is one of the enduring legacies of the international response to the horrors of the Second World War. In the famous words of the Nuremberg Judgment, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." International Military Tribunal (Nuremberg), Judgment, Oct. 1, 1946, 41 AM. J. INT'L L. 172, 221 (1947). As Justice Jackson explained:

> [The Nuremberg Charter] for the first time made explicit and unambiguous what was theretofore . . . implicit in International Law, namely, that to . . . persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with [a war of aggression], or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.

Robert H. Jackson, Final Report to the President on the Nuremberg Trials, Oct. 7, 1946, U.S. Dep't St. Bull. vol. XV, nos. 366-391, Oct. 27, 1946, at 771, 774. The commitment to the protection of human rights and, as a corollary, the punishment of human rights abuses were soon reflected in the U.N. Charter, the Universal Declaration of Human Rights, the Convention Against Genocide, the ICCPR, and the Convention Against Torture. Nevertheless, although international norms have defined the core human rights guarantees with ever greater precision, enforcement of these protections remains inconsistent, and therefore has become an increasingly urgent priority.

The United States government has long proclaimed its

commitment to the international effort to bring to justice those who violate core human rights norms, dating back at least to the Nuremberg Tribunals and including the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. This commitment was reflected in the executive branch's support for the *Filártiga* doctrine when the case was pending before the Second Circuit. It was reiterated in 1991 by President George H.W. Bush, who, when signing into law the Torture Victim Protection Act, expressed his support for "the fundamental goals that this legislation seeks to advance." He stated, "In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 16, 1992).

The same commitment has been expressed repeatedly by President George W. Bush and other members of the current administration. In his 2002 State of the Union address, President Bush linked human rights and respect for the rule of law to efforts to combat terrorism: "We have a great opportunity during this time of war [against terrorism] to lead the world toward the values that will bring lasting peace . . . . America will always stand firm for the non-negotiable demands of human dignity . . . ."[25] A spokesperson for the administration further detailed the U.S. commitment to the rule of law:

> Here's what America believes in: We believe in justice and the promotion of the rule of law. We believe those who commit the most serious crimes of concern to the international community should be punished. We believe that states, not international institutions are primarily responsible for ensuring justice in the international

[25] *Available at* http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html.

> system. We believe that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom.[26]

U.S. policy has consistently recognized the importance of accountability for serious violations of international norms and encouraged the use of domestic legal remedies for that purpose.

The concept of accountability includes not only punishment of perpetrators, but also redress to victims and survivors of human rights abuses. The UDHR states explicitly: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights. . . ." Art. 8. The ICCPR requires states "to develop the possibilities of judicial remedy," and "to ensure that the competent authorities shall enforce such remedies when granted." Art. 2(3). Several international agreements contain similar obligations, while others also specifically protect the right to compensation.[27]

In order to implement this internationally recognized right to a remedy, governments must open their legal systems to claims

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[26]Mark Grossman, Remarks to the Center for Strategic and International Studies, May 6, 2002, *available at* http://www.state.gov/p/9949.htm (statement regarding the U.S. withdrawal of its signature from ICC agreement, noting that the U.S. agreed with the underlying principles, but not the ICC itself).

The United States regularly reaffirms this principle in international settings. For example, the executive branch recently supported the adoption by consensus of a resolution "emphasiz[ing] the importance of taking all necessary and possible steps to hold accountable perpetrators . . . of violations of international human rights and humanitarian law." U.N. Commission on Human Rights, Res. 2003/72 (April 25, 2003).

[27]*See, e.g.*, ICCPR, art. 9(5) ("Anyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation."); Convention Against Torture, art. 14(1) ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation . . . ."); Declaration on Enforced Disappearances, art. 5 (perpetrators are liable to both criminal penalties and civil suit).

by victims and survivors of human rights abuses. States must "[a]dopt appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective, and prompt access to justice" and "[a]fford appropriate remedies to victims."[28] International law does not define the exact nature of the judicial proceedings appropriate to meet these obligations. It therefore leaves each state to adopt procedures appropriate to its own legal system.

B. States adopt varied mechanisms to enforce international law that are appropriate to their national legal systems, including civil, criminal and administrative proceedings and both public and private endeavors.

Violations of international law have long been redressed primarily through domestic courts. Historically, enforcement of the protections due to diplomats, the rules governing neutrality, the laws of prize, and the punishment of pirates were delegated to national legal systems, which applied international norms to the issues pending before them. Today, enforcement of international human rights norms continues to rely heavily on domestic legal systems. Each domestic system, however, applies the mechanisms appropriate to its own legal process.[29] As a result, a wide variety of enforcement efforts are underway

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[28]Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni U.N. ESCOR, 56th Sess., at §§ 2(b), 2(c), 3(d), U.N. Doc. E.CN.4/2000/62. *See generally* U.N. Commission on Human Rights, Basic Principles and Guidelines on the Right to a Remedy (rev. Oct. 24, 2003), U.N. Doc. E/CN.4/2004/57 (2004) (discussing the internationally protected right to substantive and procedural remedies, including equal and effective access to justice).

[29]*See generally* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

around the world.

In a state with a fully functioning judicial system, victims of human rights abuses should have access to domestic remedies in the forum in which the violations occur. Human rights abuses constitute crimes for which the perpetrators should be prosecuted. Victims should be able to obtain compensation by attaching claims to the criminal action, through independent civil lawsuits, and by means of other models, such as truth commissions or other administrative mechanisms. *See generally* Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2d ed. 2001).

In addition to domestic remedies for local abuses, international law *requires* that states provide redress for certain human rights abuses that occur in other states. This obligation reflects in part the reality that a domestic legal system may be incapable of affording justice for massive abuses, because the local government is complicit in the human rights violations or because the local judicial system is not able to afford adequate remedies. It also reflects a concern that perpetrators not escape justice by fleeing to safe havens in other nations. The Geneva Conventions, for example, require state parties to search for persons alleged to have committed "grave breaches" of the laws of war and to "bring such persons, regardless of their nationality, before [their] own courts." *See, e.g.*, Geneva Convention I, arts. 49, 50. Similarly, a state party to the Convention Against Torture, art. 5(2), is required to prosecute an alleged offender present in its territory, unless the accused is extradited to a state that has jurisdiction to prosecute. Several treaties addressing terrorism authorize prosecution of offenders, regardless of where the crimes were committed. *See, e.g.*, International Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; International Convention for the Suppression of Terrorist Bombings, Jan. 9,

1998, 37 I.L.M. 249 (1998).[30] These provisions reflect a common pattern in international treaty law: the state where a perpetrator is found must either send the accused to another state for prosecution or initiate prosecution in its own courts. Clark, 57 NORDIC J. INT'L L. at 85.

In addition, international law *authorizes* all states to hold accountable perpetrators of other international abuses. International Law Association, Final Report on the Exercise of Jurisdiction in Respect of Gross Human Rights Offences 4-5 (2000).[31] Thus, even where not specifically *obligated* to provide domestic remedies for abuses occurring in other nations, many states have chosen to authorize criminal prosecutions, civil lawsuits or other comparable measures in fulfillment of their general obligation to hold accountable perpetrators of gross human rights abuses. The peculiarities of each national legal system determines which of these varied procedures it uses.

In the United States, public prosecutors can file criminal charges for torture committed anywhere in the world. 18 U.S.C. §§ 2340, 2340A, 2340B. Genocide and war crimes also constitute crimes within the U.S. legal system. 18 U.S.C. §§ 1091, 2441. In addition, along with the ATCA, three statutes enacted since 1992 authorize civil claims by victims of human rights abuses. The Torture Victim Protection Act creates a right to sue for torture or extrajudicial execution. 28 U.S.C. § 1350 (1992). As part of an anti-terrorism initiative, Congress has also authorized civil suits for victims of terrorism. 18 U.S.C. § 2333

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[30]For additional treaties, see Roger S. Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 NORDIC J. INT'L L. 49 (1988), which provides a comprehensive analysis of treaty provisions authorizing jurisdiction over international offenses.

[31]*See also* Amnesty International, Universal Jurisdiction: The Duty of States to Enact and Implement Legislation (2001) [hereinafter Amnesty International, Universal Jurisdiction].

(1994). A 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) permits civil suits for torture, extrajudicial killing, and other abuses against foreign governments designated as "state sponsor[s] of terrorism." 28 U.S.C. § 1605(a)(7). Each statute represents one mechanism by which the United States complies with its obligation to provide remedies to victims of human rights abuses.

Countries around the world comply with their obligation to facilitate accountability through mechanisms adapted to their domestic legal systems. Germany, for example, recently adopted a statute permitting criminal prosecution for crimes in violation of international law, even where the crimes have no connection to Germany.[32] Many nations have similar laws authorizing prosecution for international crimes, at least where the defendant is present in the forum state. The Netherlands, for example, asserts jurisdiction to prosecute for war crimes and torture committed elsewhere.[33] The Criminal Justice Act of 1988 permits prosecution in the United Kingdom of extraterritorial acts of torture.[34] Austria, Denmark, France, Ireland, Italy, Spain, Australia, New Zealand, South Africa and Canada all permit similar criminal prosecutions.[35]

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[32]Gesetz zur Einführung des Völkerstrafgesetzbuches (Act to Introduce the Code of Crimes Against International Law), BGBl I.S. 2254 (June 26, 2002) (English translation available at http://www.bmj.bund.de/images/11461.pdf).

[33]*Prosecution of Darko Knesevic*, HR Nov. 11, 1997, 1998 Dutch Law Reports 463 (war crimes); *Prosecution of Bouterse*, HR Sept. 18, 2001, *available at* http://www.rechtspraak.nl (LJN NO AB 1471) (torture).

[34]Criminal Justice Act, c.134 (Eng.).

[35]*See, e.g.*, Penal Code, art. 64(1)(6) (Aus.) (translation found in Austria's initial State party report to the Committee against Torture (CAT/C/5/Add.10), ¶¶ 23, 24) (torture, war crimes); Penal Code § 8(5) (Den.) (torture, war crimes); Criminal Procedure Code, arts. 689 to 689-10 (Fr.) (torture, terrorism, piracy, among others); Geneva Conventions Act (1962), as amended by the Geneva Conventions (Amendment) Act (1998)

Pursuant to these statutes, domestic criminal prosecutions target defendants accused of human rights violations committed outside the forum state, generally when the alleged perpetrators are found in the forum or the victims are nationals of the forum state. To cite just a small set of examples, in the Netherlands, an army officer faces trial for acts of torture and rape committed in what was then Zaire (now the Democratic Republic of the Congo).[36] Four Rwandans were convicted in Belgium for crimes committed during the 1994 genocide in Rwanda.[37] Argentine naval officers are currently in jail in Spain, awaiting trial for genocide and terrorism after having been extradited from

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§ 3, and Criminal Justice (U.N. Convention Against Torture) Act (2000) §§ 2, 3 (Ir.) (torture, war crimes); Law No. 498 (Nov. 3, 1988), art. 3(1)(c), Penal Code, arts. 7(5), 10, Law No. 962 (Oct. 9, 1967) (Italy) (torture, genocide); Organic Law of the Judicial Power 6/1985 (July 1), art. 23.4 (Spain) (genocide, terrorism, piracy, among others); Crimes Act (1988) art. 7 (Aus.) (torture); International Crimes and International Criminal Court Act (2000), arts. 9, 10 (N.Z.) (genocide, crimes against humanity); Implementation of the Rome Statute of the International Criminal Court Act (2002) (S. Afr.) (torture, war crimes, among others); Crimes against Humanity and War Crimes Act (2000), c. 24 (Can.) (crimes against humanity, war crimes). *See generally* Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford Monographs in International Law Series) (2003) (describing legal structure in 14 countries); Redress Trust and International Federation for Human Rights, *Universal Jurisdiction in the European Union: Country Studies* (2003).

Approximately 125 nations permit prosecution for international crimes committed abroad, regardless of the nationality of the perpetrator. Amnesty International, Universal Jurisdiction 3.

[36]Anthony Deutsch, *Dutch Court Charges Congolese Colonel,* AP, Sept. 30, 2003 (explaining that Dutch authorities established a special branch to prosecute people found in the Netherlands who are suspected of responsibility for genocide and other war crimes in other countries); *DRC officer accused of torture to go on trial in March,* AFP, Jan. 7, 2004.

[37]*In re Vincent Ntezimana, et al.*, Brussels Court of Assizes, June 8, 2001, *available at* http://www.asf.be/AssisesRwanda1/fr/fr_VERDICT_verdict.htm.

Mexico.[38] In Switzerland, a Rwandan man was convicted of grave breaches of the Geneva Conventions for abuses committed during the genocide.[39] Courts in a dozen countries have exercised such jurisdiction. Amnesty International, Universal Jurisdiction 4.

Private parties, not public prosecutors, have initiated most of these prosecutions, as permitted by the criminal procedures of many civil law legal systems. The Pinochet extradition battle, for example, began as a criminal investigation in Spain initiated by private organizations. Moreover, criminal procedures in many civil law systems permit private persons injured by a crime to pursue a claim for compensation as part of a public or private criminal prosecution.[40] In Spain, for example, a civil claim is automatically attached to a criminal action.[41] Thus, because they allow victims of egregious human rights abuses to seek remedies from the perpetrators, privately initiated criminal prosecutions have much in common with U.S. civil lawsuits under the ATCA.

Civil lawsuits for human rights violations and criminal prosecutions do not exhaust the permissible domestic remedies. Lawsuits founded on domestic tort law also serve to hold perpetrators accountable and to provide redress to victims of human rights abuses. Claims that might be filed in the United

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[38]*Extradición Amparo en Revisión* 140/2002 (June 12, 2003) (Ricardo Miguel Cavallo) (Mexico Supreme Court decision), *available at* http://www.scjn.gob.mx/inicial.

[39]*See* Luc Reydams, International Decision, *Niyonteze v. Public Prosecutor*, 96 AM. J. INT'L L. 231 (2002).

[40]*See generally* J. A. Jolowicz, Procedural Questions, in 11 International Encyclopedia of Comparative Law, ch. 13, at 5-11 (Andre Tunc ed., 1986) (describing the interdependence of civil and criminal actions in many legal systems).

[41]Código Penal [C.P.], arts. 109-100 (Spain); Ley De Enjuiciamiento Criminal [L.E.Crim], art. 100 (Spain).

States under the ATCA have been litigated as negligence suits in England, Canada, and Australia. *See* Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 456-58 (2001) (listing cases). Accountability in domestic legal systems also proceeds through a range of administrative actions. For example, the United States and many other nations have long used immigration restrictions to exclude those who have committed certain human rights violations. *See* 8 U.S.C. § 1182(a)(3)(E) (declaring that those who participated in Nazi persecutions or engaged in genocide are inadmissible to the United States). Administrative actions to freeze or seize the bank accounts of those accused of human rights violations also further the same goals.[42]

The three foreign government *amici* affirm both the importance of accountability in international law and the need to enforce human rights norms through appropriate procedures. Brief of Amici Curiae Government of the Commonwealth of Australia, et. al. at 2, 27, *Sosa v. Alvarez-Machain*, 331 F.3d 604 (9th Cir. 2004) (No. 03-339). Their challenge to the ATCA is based on a fundamental misconception that the statute is applied indiscriminately to cases having no connection to the United States. To the contrary, U.S. courts have applied the statute primarily to U.S.-based defendants. Moreover, traditional doctrines, such as forum non conveniens and exhaustion of domestic remedies, serve to weed out cases that properly should

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[42]*See, e.g., Hilao*, 25 F.3d at 1476-80 (affirming injunction preventing the Marcos estate from disposing of assets, including Swiss bank accounts); Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L L. PROC. 313, 315 (1998) (describing a proceeding in which a Spanish court asked Switzerland to freeze assets of some forty Argentine military officers under investigation for human rights abuses in Argentina).

be litigated in the country in which the abuses took place.[43] Most of the cases the governments cite in their parade of horribles have already been dismissed by U.S. courts; motions to dismiss are pending in several others. *Id.* at 12-13 nn. 13-25.

The foreign governments also err in asserting that international law precludes the assertion of jurisdiction over civil claims in the absence of a specific treaty authorization. The crux of their objection is that U.S. courts have in the past applied U.S. substantive law to hold foreign corporations liable for conduct that is permitted by their own national laws and by international law. *See, e.g., id.* at 9 (discussing antitrust cases). Indeed, the three governments are concerned about the South Africa apartheid litigation for exactly that reason: they fear that the U.S. courts will impose liability for conduct that was lawful under domestic and international law. However, if the conduct does not violate universally recognized norms, it does not trigger liability under the ATCA. The appropriate response would be a motion to dismiss the claims for failure to state a violation of a universally established international norm. Such a motion is currently pending in the *apartheid* cases. There is no reason to find the ATCA to be unconstitutional or harmful to U.S. foreign relations merely because one set of plaintiffs has asserted claims that allegedly fall outside the narrow boundaries of the statute.

Moreover, as discussed in detail above, each domestic legal system implements its international law obligations in the manner best suited to its local procedures. In the United States, that entails civil litigation. In many civil law countries, it entails

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[43]Significantly, the governments note that their concerns would be "ameliorate[d]" if U.S. courts applied a doctrine of exhaustion of domestic remedies. *Id.* at 24-25 n.36. But the forum non conveniens doctrine that is applied by U.S. courts requires dismissal of a lawsuit if an adequate, alternative forum provides a more efficient venue -- a standard that inevitably leads to dismissal of claims that do not exhaust available domestic remedies.

privately initiated criminal prosecutions with civil claims attached. International jurisdictional rules do not distinguish among the varied measures appropriate to a national judiciary. *See* Stephens, *Translating Filártiga*, 27 YALE J. INT'L L. at 39-53. Rather, through a variety of legal mechanisms, public or private actors further accountability through remedies that seek both compensation to those injured and punishment of the perpetrators.

Civil litigation under the ATCA is part of the global effort to address impunity and hold perpetrators of egregious abuses accountable for their actions. As such, it plays a central role in the worldwide movement to fight impunity.

III. THE ARBITRARY ARREST AND DETENTION OF RESPONDENT VIOLATED A CORE PRINCIPLE OF INTERNATIONAL HUMAN RIGHTS LAW.

All parties before the Court acknowledge that arbitrary arrest and detention violate core norms of international law. All parties recognize, as they must, that the U.S. government cannot disregard lawful limits on governmental authority to arrest and detain private individuals. All agree that such unlawful actions are no less a violation of fundamental norms when a government hires private persons to undertake the illegal tasks. These points of agreement represent a fundamental consensus that all governments are bound to obey the law when they exercise their authority to arrest and detain.

The basic facts of this case are not in dispute. Respondent Alvarez-Machain was abducted from his medical office and detained against his will by Petitioner Sosa and other Mexican nationals hired by the U.S. Drug Enforcement Agency. The abductors acted in Mexico without lawful authority under domestic or international law. Respondent was held without notification to his family or the lawful authorities in Mexico and

transported to the United States the next day.

Applied to these facts, as found by the lower courts, the core principles set out above demonstrate that Respondent's arrest and detention were arbitrary because they were not pursuant to law.[44] Unlawful arrests and detentions violate clearly established rules of international law. Indeed, over 10 years ago, the U.N. Working Group on Arbitrary Detention reviewed Respondent's case and concluded that the abduction constituted arbitrary detention in violation of art. 9 of the UDHR and art. 9 of the ICCPR. U.N. Doc. E/CN. 4/1994/27, Dec. No. 48/1993 (USA). The Working Group found that "no legal basis whatsoever can be found to justify the deprivation of liberty." *Id.* As an arbitrary arrest and detention in violation of core principles of international law, the violation of Respondent's rights is thus actionable under the ATCA.[45]

The length of Respondent's detention is not determinative: neither international law nor domestic law place a temporal limit on arbitrary detention. The ICCPR, for example, contains no such condition, stating clearly, "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." Art. 9(1). The UDHR similarly states, "No one shall be subjected to arbitrary arrest, detention or exile." Art. 9. *See also* United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention*

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[44]The court below correctly noted that arbitrariness could also stem from an "unjust" arrest or detention under international law, but found no need to undertake this separate analysis because of its determination that the arrest was unlawful. *Alvarez-Machain*, 331 F.3d at 623 n.21.

[45]The Ninth Circuit also correctly concluded that the arrest and detention of Respondent in Mexican territory, without the consent of the Mexican authorities, violated international law. *Id.* at 621. Although this issue is not presently before the Court, the unauthorized exercise of law enforcement power outside of U.S. territory further rendered the arrest and detention unlawful.

and Exile 7 (1964) ("an arrest or detention is arbitrary if it is . . . on grounds or in accordance with procedures other than those established by law . . . ."). Although the Restatement defines the violation as *prolonged* arbitrary detention in § 702(e), none of the international agreements include this restriction, and U.S. cases have not imposed it. *See, e.g., Paul,* 901 F. Supp. at 333-34 (concluding one of the plaintiffs suffered arbitrary detention although he was held for less than ten hours). The right to be free from arbitrary arrest and detention cannot be measured in terms of a predetermined number of hours or days.

Finally, the Ninth Circuit correctly held that Alvarez' arrest and detention were unlawful because Congress has not authorized the Drug Enforcement Agency to make extraterritorial arrests. This issue is not a mere technicality: the rule of law and indeed this nation's fundamental principles of democracy are demeaned if a government agency can authorize an abduction without regard for the law, detain an individual unlawfully, and then refute the right to compensation or remedy for the violation. To conclude otherwise would be to unravel the fundamental principles on which both U.S. law and international law are so firmly based.

CONCLUSION

The United States has long presented itself to the world as a champion of human rights, both at home and abroad. U.S. foreign policy claims the promotion of international human rights norms as one of its central goals. The refusal to serve as a safe haven for those who have committed serious human rights violations is indispensable to that effort. As the U.S. Government argued in its *amicus* brief in support of the plaintiff in *Filártiga*, where well-defined, universally recognized human rights are at issue, "a refusal to recognize a private cause of action might seriously damage the credibility of our nation's commitment to the protection of human rights." Judicial repeal

of the ATCA would undercut the U.S. claim of leadership in the struggle to enforce basic human rights.

Such a retreat from a commitment to the rule of law would be particularly damaging today, as the United States seeks international cooperation to combat terrorism. The United States has asked the countries of the world to ensure that they not serve, intentionally or unwittingly, as safe havens for those who commit egregious violations of international law. To make this request credible, and to lead by example, the United States cannot do otherwise within its own borders. The judgment below, holding Petitioner Sosa responsible for violations of international human rights law, is consistent with U.S. domestic law and international law, and makes an important contribution to the worldwide battle against impunity. It should, therefore, be affirmed.

Respectfully submitted,

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February 27, 2004

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Appendix A:
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Castan Centre for Human Rights Law
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Monash University, Victoria 3800, Australia

Catholic Agency for Overseas Development
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Center for Civil and Human Rights,
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Center for Constitutional Rights
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Center for Economic and Social Rights
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Center for Human Rights and Global Justice
New York University School of Law
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Center for Human Rights of the Robert F. Kennedy Memorial
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Center on Housing Rights and Evictions
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Center for Justice & Accountability
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San Francisco, CA 94102, USA

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Earthrights International
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Faith and Action
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Friends of the Earth
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Global Rights (formerly International Human Rights Law Group),
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Global Witness
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United Kingdom

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Berkeley, CA 94705 USA

Human Rights Council of Australia
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South Maroubra, NSW 2035, Australia

Human Rights First (formerly Lawyers Committee for Human Rights)
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Human Rights Watch,
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Immigration Clinic
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